EDITOR'S NOTE

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

CHARLES J. SCULLY, HAROLD J. SMITH, WALTER KELLY, EVERETT N. JONES, THOMAS A. COUGHLIN, III and HIRSHEL JAFFEE

Petitioners,

-against-

YEVGEN FROMER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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No. 87-169

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Respondent Yevgen Fromer respectfully submits this brief in opposition to the petition of Charles J. Scully, Harold J. Smith, Walter Kelly, Everett W. Jones, Thomas A. Coughlin, III and Hirshel Jaffee for a writ of certiorari.

Both courts below held that a directive of the New York State Department of Correctional Services ("DOCS") (Directive #4914) limiting the permissible length of a prison inmate's beard to one inch is unconstitutional as applied to respondent, an Orthodox Jew whose religious belief prohibited the cutting of his beard. Petitioners seek certiorari on the sole ground that the decision of the Court of Appeals conflicts with the later decisions of this Court in Turner v. Safley, 107 S. Ct. 2254 (1987) and O'Lone v. Shabazz, 107

S. Ct. 2400 (1987). Petitioners ask this Court to grant certiorari, summarily vacate the judgment below and remand the case to the Court of Appeals for the Second Circuit for reconsideration in light of the Safley and Shabazz cases. For the reasons to be stated, it is submitted that such prolongation of the litigation is unwarranted and that the petition should be denied.

The Conflict

The courts below, following the decision in Wali v. Coughlin, 754 F.2d 1015 (2d Cir. 1985), reviewed the challenged Directive under the standard of "strict scrutiny", placing the burden on the State to show that the challenged denial of respondent's religious freedom "is necessary to further an important governmental interest" and that "the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved" (App. at 9a, 33a).[1]

In Safley, this Court rejected the "hierarchy of standards of review" described in Wali. It announced the single standard that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 107 S. Ct. at 2261. The same rule was restated in Shabazz, 107 S. Ct. at 2404.

The conflict on which petitioners rely is thus a conflict between the opinions of the courts below and those of this Court in its two later cases. This Court, however,

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1 App. refers to the Appendix to the Petition.

"reviews judgments, not opinions."[2] In each of the cases, there was a trial of the factual issues as to the relation between the constitutional rights of the plaintiff inmates and the governmental interests asserted by the defendant officials. It is submitted that the differences between the resulting judgments do not present any issues which would warrant intervention by this Court or further consideration of this case in the courts below.

The Proceedings Below

The District Court decision below was reached after a six-day trial. Two issues were tried: the sincerity of respondent's belief that the cutting of his beard would be contrary to his religious convictions, and whether the Directive, as applied to respondent, was justified by any of the considerations advanced to support it. On both issues, the District Court carefully reviewed the evidence and decided in respondent's favor (App. 19a-39a). The Court granted respondent declaratory relief and an injunction against enforcement of the Directive (App. 15a-16a). On appeal, petitioners abandoned their attack on the sincerity of respondent's religious convictions and contended solely that the Directive could constitutionally be enforced against him. The Court of Appeals unanimously affirmed; it specifically considered each challenge by petitioners to the findings of the District Court and found them without merit (App. 1a-14a).

After the decision below, but before the Petition was

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2 Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984); Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956).

filed, respondent was released on parole.[3] While this did not render the case moot,[4] it did deprive it of its practical significance. Respondent is now free to leave his beard uncut without the benefit of the injunction. And in future cases petitioners will have the benefit of the lighter burden of proof under Safley. Accordingly, if certiorari were granted, the only issue on remand would be whether the conclusion reached by the courts below may be sustained under the standard of reasonableness announced in Safley. That issue, it is submitted, does not merit a grant of certiorari. It will be shown that the judgment below is compatible with the standard announced by this Court and that, in any event, further litigation on the subject could produce no benefit to petitioners.

The Compatibility of the Decision Below with Safley and Shabazz

While this Court's emphasis on the deference owed to judgments of the prison authorities effects a change in the burden of proof from that applied below, the Safley opinion itself recognized the limits to that deference; it affirmed a decision reached by the lower courts under the strict

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3 The Court and petitioners were informed of his parole by letter from respondent's counsel to the Clerk of the Court, dated August 5, 1987.

4 Respondent had been subjected to disciplinary action including solitary confinement which was terminated only when the District Court, by temporary restraining order, so directed. The relief granted by the District Court after trial included the expunging of the disciplinary action from his record, and any issue as to that relief is not mooted by his parole. Cf. Hewitt v. Helms, 107 S. Ct. 2672, 2679 n. 1 (1987) (dissenting opinion) ("[p]etitioners have offered no authority, nor can they, for the remarkable proposition that the request for expungement of respondent's record became moot upon his parole". The majority opinion did not dispute this point.)

scrutiny standard invalidating a Missouri restriction on the right of prisoners to marry.

Moreover, the reasoning in both the Safley and Shabazz opinions, despite their rejection of the Wali rule, is not irreconcilable with the decision of the courts below in this case. In both, the Court recognized the need to seek a "balance" between the First Amendment rights of inmates and the penological objectives as to which deference is due to the judgment of the authorities. Safley, 107 S. Ct. at 2261; Shabazz, 107 S. Ct. at 2404. Despite its statement of the new standard in terms only of concern for prison administration, the Court in Safley noted the teaching of Pell v. Procunier, 417 U.S. 817, 824 (1974) and later cases that "in determining the scope of the burden placed by the regulation on inmates' First Amendment rights . . . it is appropriate to consider the extent of this burden 'when we [are] called upon to balance First Amendment rights against [legitimate] governmental interests.'" 107 S. Ct. at 2261.

Both Safley and Shabazz were decided after trials of the facts such as that held by the District Court in this case. On their facts, both are plainly distinguishable from this case. In Safley, the prohibition against correspondence between prisoners in different institutions was justified by evidence of the existence of prison gangs and the efforts of the authorities to break them up. Such correspondence was shown to "threaten the core functions of prison administration, maintaining safety and internal security" and to have a potential "ripple effect" on the inmates and staff of more than one institution. 107 S. Ct. at 2363. In Shabazz, the regulation, which had been upheld by the District Court but

invalidated by the Court of Appeals, prevented Muslim inmates from attending Friday afternoon services. That result could not be avoided, despite efforts by the authorities to do so, without incurring substantial security risks and added administrative burdens.

The record in this case contains no evidence of security problems comparable to those in Safley and Shabazz. Indeed, applying the rule of those cases, one District Court recently upheld the sufficiency of a complaint challenging the provision of the Directive at issue here. In Ross v. Coughlin, 86 Civ. 1277 (SWK) (S.D.N.Y. Aug. 3, 1987) (Westlaw), the Court declared (at 4) that "[u]nder the new standard of 'reasonably related' the government has not shown that the 'beard-trim' regulation in Directive #4914 is logically related to legitimate governmental interests to deprive a prisoner of First Amendment rights."

Moreover, in an earlier case brought by a Rastafarian, petitioner Coughlin, the DOCS Commissioner, had consented to the very relief granted by the courts below. In Phillips v. Coughlin, 586 F. Supp. 1281 (S.D.N.Y. 1984), he entered into a Stipulation of Partial Settlement, a copy of which was appended to respondent's brief in the District Court and is an appendix hereto. That Stipulation provides (at RA-2 - RA-3) that "neither DOCS nor any of its agents or employees will cut, shave, order the cutting or shaving or otherwise shorten, remove or comb out plaintiff's hair or beard at any time during his current term of incarceration or any subsequent reincarceration in the event that plaintiff is able

to obtain a retrial and is reconvicted on the same charge."[5]

The Safley opinion describes four factors as relevant in determining the reasonableness of a challenged regulation. Petitioners discuss those factors for their bearing on the decision below. That discussion, it is submitted, is unconvincing. As to each of the factors, the record undermines the purported justification.

First, as to the existence of "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it" (Safley, 107 S. Ct. at 2262), petitioners cite the "expert testimony of Deputy Commissioner Coombe regarding the prison administration's interests in facilitating identification and inhibiting the possession of contraband" (Petition at 20). Of course, no expert testimony is required to establish the existence or importance of those administrative interests. Their application here is rendered suspect not only by the Phillips Stipulation quoted above, but also by other provisions of the prison regulations and by specific testimony of Coombe referred to in the opinion of the District Court. As to identification, Directive #4914 provides that if in the opinion of prison officials an inmate drastically changes his appearance by changing the length of his hair or growing or shaving his beard, he will be rephotographed at the inmate's

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5 Both Phillips and Ross also involved another provision of Directive #4914 which requires that each incoming prisoner be given an initial shave. The constitutionality of that requirement was upheld as a reasonable security measure in Phillips under the Second Circuit rule and in Ross under the Safley standard. Although respondent was subjected to the inital shave portion of the Directive (App. at 23a), its validity is not at issue here.

expense (App. at 43a).[6] In Phillips v. Coughlin, supra, the court referred to testimony of a deputy commissioner of the DOCS that "it is standard practice in the event of an escape for DOCS to supply its own staff and the police officers involved in security and recapture efforts with both current and clean-shaven photos of the missing prisoners." 586 F. Supp. at 1284.[7]

As to contraband, the District Court found that drugs or weapons could be hidden at least as easily in an inmate's long hair, clothing or body as in his beard, and it cited Coombe's testimony that he had never heard of an instance where an inmate had concealed contraband in his hair or beard. The Court also referred to Coombe's description of the present DOCS search procedures in which fingers are run through the beard and hair (App. at 37a).[8]

The second relevant factor identified in Safley "is

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6 As to the goal of identification of inmates, the District Court found that untrimmed beards would not lead to increased problems "[s]ince inmates may drastically change their appearances in numerous ways while still complying with Directive #4914" (App. at 35a). To the same effect, see Moskowitz v. Wilkinson, 432 F. Supp. 947, 951 (D. Conn. 1977), where the Court stated that "[t]he need for a no-beard rule to facilitate inmate identification is also undermined by the Bureau's present policy of allowing hair styles of any length as well as mustaches and sideburns."

7 Petitioners claim that rephotographing is not viable because of the multitude of pictures of long-bearded inmates that might be necessary (Petition at 19). That claim is rebutted by the District Court's finding quoted above that appearances may be changed in numerous permissible ways. Thus, the asserted necessity may exist under the present regulation. Petitioners offered no evidence of any problems caused by this regulation.

8 One court has noted that "it seems frivolous to suggest that beards are likely hiding places for contraband where inmates are permitted to wear three-inch Afro haircuts." Monroe v. Bombard, 422 F. Supp. 211, 217 (S.D.N.Y. 1976).

whether there are alternative means of exercising the right that remains open to prison inmates." 107 S. Ct. at 2262. Literal application of this factor as petitioners read it would completely destroy the freedom of religion protected by the First Amendment. Any religious person may engage in prayer; the fact that other rituals remain available is obviously no substitute for compliance with the tenet that facial hair should be uncut.[9] Petitioners' position would lead to the view that any arbitrary and capricious restriction of a religious practice should be upheld since other practices are available.

There is likewise no evidence in the record to justify the Directive on the third consideration mentioned in Safley, "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally". 107 S. Ct. at 2262. Here again the Petition (p. 21) refers only to the testimony of the deputy commissioner that the alternative of rephotographing and searching beards "would significantly impact on both the allocation of resources and the potential for confrontation between inmates and correction officers". Compliance by the officers with DOCS directives is thus characterized as burdensome, with no evidence as to specific experience on the subject. In the cosmopolitan setting of a New York prison, guards and other inmates constantly associate with a variety of faces. The present record contains no evidence of a potential "ripple effect" on fellow inmates or on staff comparable to the organizational efforts

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9 Both the District Court and Court of Appeals found that requiring respondent to trim his beard would work a total deprivation of this tenet (App. at 11a-12a, 32a).

referred to in Safley, 107 S. Ct. at 2263, citing Jones v. North Carolina Prisoners Labor Union Inc., 433 U.S. 199 (1977).

As to the fourth factor, "the absence of ready alternatives", the Petition (p. 21) quotes the statement in Safley that a regulation may not meet the reasonable relationship test "if an inmate claimant can point to an alternative that fully accomodates the prisoner's rights at de minimis cost to valid penological interests." 107 S. Ct. at 2262. It then merely repeats the assertions advanced regarding the first three factors, and asserts that the supposed problems of recapturing escaped convicts, detecting dangerous contraband and increasing the likelihood of a confrontation between inmates and correction officers are "costs" which are "hardly de minimis". On the trial record, it must be held that these supposed costs are no greater than those imposed by compliance with other provisions of the Directive. The authorities, having adopted those provisions, obviously do not regard them as burdensome. The record establishes that the challenged Directive, like the marriage restriction condemned in Safley, represents an "exaggerated response" to petitioners' security objectives.

In short, application of this Court's "reasonableness" standard does not require enforcement, over respondent's religious objection, of a limitation on beards which has been found to be unnecessary in numerous other prison systems, including the Federal Bureau of Prisons (App. at 11a), and which petitioner Coughlin, the head of DOCS, himself found

unnecessary in the case of Phillips.[10]

Remand to the Court of Appeals is Inappropriate and Unnecessary

Petitioners ask that the judgment below be vacated and the case remanded to the Court of Appeals for reconsideration in light of the Safley and Shabazz cases. That procedure is generally followed where certiorari is sought to review a decision apparently inconsistent with a recent case in this Court or one which is pending here. The subject has been analyzed by Professor Hellman who described it as "[t]he most puzzling mode of disposition in the Supreme Court's repertory",[11] the extensive use of which has caused considerable confusion in the lower courts and at the bar.

Professor Hellman's statistical study of this Court's records over a number of terms has shown that in a significant number of cases the courts of appeals on remand have adhered to their prior decisions. He has noted (Second Thoughts p. 39) that

> "if there is even a surface inconsistency between the holding below and the new precedent, the Court will generally remand for reconsideration by the lower court.

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10 Indeed, the record warrants the surmise that the effort to enforce the Directive against respondent and the punitive action against him may be attributed to the misgivings of the officials about the sincerity of his religious convictions, an issue which was disposed of by the decision of the District Court from which no appeal was taken. The record shows that at least two-thirds of the pages in the trial transcript relate to respondent's sincerity and issues of Jewish law.

11 Hellman, The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions, 11 Hastings Const. L. Q. 5 (1984) (hereinafter "Second Thoughts"). See also Hellman, Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review, 44 U. Pitt. L. Rev. 795 (1983).

> Seen in this light, the process begins to look very much like a species of review for error. Although denial of review is not, in theory, an affirmance, and a remand for reconsideration is not tantamount to reversal, the determination to invoke one mode of disposition rather than the other is governed by the same basic criterion that underlies the exercise of review for error: the correctness of the judgment below -- here judged by reference to the intervening Supreme Court decision."

It has been shown that here the only "inconsistency between the holding below and the new precedent" is in the standard of review applied, not in the judgments on wholly dissimilar prison regulations. The rule as to the standard of review is no longer an open question; it has been settled for all the courts by the Safley opinion.[12] On the proposed remand, the only question would be whether application of the new standard would warrant the conclusion reached on the facts as to which there has been a lengthy trial and appellate review.

For this Court to vacate the judgment and remand the case for that purpose would, as Professor Hellman states, "look very much like a species of review for error". While defending the practice in the few cases for which it is appropriate, such as situations in which the petition is held pending decision in a case already on the Court's docket,

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12 Cf. Oneida of the Thames Band v. State of New York, 771 F.2d 51 (2d Cir.), cert. denied, 106 S. Ct. 78 (1985). There the Court, on an interlocutory appeal, had reversed an order disqualifying counsel in a civil case. Following the decision of this Court in Richardson-Merrell Inc. v. Koller, 472 U.S. 424 (1985) that such an order was not appealable, the unsuccessful appellee in the Oneida case filed a petition for certiorari and also moved in the Second Circuit for recall of its mandate. The Second Circuit accurately predicted that this Court would deny the petition for certiorari, noting that the issue of whether an order disqualifying counsel was subject to an interlocutory appeal had been settled by this Court's decision in Richardson-Merrell which all other appellate courts are bound to respect in later cases.

Professor Hellman wrote (Second Thoughts p. 39):

> "At first blush, it may seem anomalous to find the United States Supreme Court engaging in something akin to review for error, and on a rather large scale at that: more than 100 cases in the 1981 Term alone, if we count (as we must) all held cases, whether the ultimate disposition be one of remand or denial of review. In recent years there has been widespread agreement that review for error should play at best a minor part in the Court's work, and that the Court should consider, in the words of the Justices, only cases 'of . . . general public importance or concern.'"

The present petition seeks application of the remand procedure to a petition filed after this Court's controlling opinions on the proper standard of review, not in one of the "held cases" where Professor Hellman finds it appropriate. In this situation the Court can avoid the radical departure from its proper role by simply denying certiorari. See Boag v. MacDougall, 454 U.S. 364, 368 (1982) (dissenting opinion of Rehnquist, J.).

The situation here is analogous to that in which a case becomes moot while a petition for certiorari is pending. Until 1978 the regular procedure in such cases was for this Court to vacate the judgment and remand the case to the Court of Appeals. However, as noted in the leading text on Supreme Court practice, Stern, Gressman and Shapiro, Supreme Court Practice, p. 723 (6th Ed. 1986):

> "[S]ince 1978, the Court has seemingly accepted the suggestion of the Solicitor General that it need not consider the often difficult question of mootness at the certiorari stage when a case is otherwise not worthy of review. In such cases the Court merely denies certiorari, leaving it to the court of appeals to enter the appropriate order to vacate and dismiss. If the Supreme Court would otherwise take the case, or if the case comes to it by appeal instead of on certiorari, it will enter such an

order itself."[13]

Since the standard of review applicable to respondent's constitutional challenge to the Directive has been resolved by this Court in Safley, the remaining issue, it has been shown, is whether, as contended above, the decision of the Court of Appeals is compatible with that standard. The issue of whether or not this Court would accept the contention that the decision below should be upheld under that standard plainly is not one for which review by certiorari should be granted.

Petitioners are not prejudiced by their inability to enforce the Directive against respondent, a former inmate now on parole. In any later cases on the issue, they will have a lighter burden of proof. Should they nevertheless deem it advisable to seek reconsideration by the Second Circuit of its judgment, they need no remand from this Court. As in the mootness cases, they can apply for relief directly to the Second Circuit. In Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 429 (2d Cir.), cert. denied, 400 U.S. 829 (1970), plaintiffs against whom a judgment had been entered learned of a state court decision which indicated that the Court of Appeals had wrongly decided their case. While a petition for certiorari was pending, plaintiffs filed a motion in the Court of Appeals "for modification of

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13 A footnote to this sentence reads in part: "See brief for the United States in opposition to certiorari in Velsicol Chem. Corp. v. United States, No. 77-900, cert. denied, 435 U.S. 942 (1978). See also Local 102, Garment Workers v. United States, 439 U.S. 1070 (1979); Commodity Futures Trading Commission v. Board of Trade, 701 F.2d 653, 657 (C.A. 7, 1983), in which Judge Posner stated: '[T]he Court may have accepted' the Government's position in Velsicol, but 'it has never said' so. Compare Alabama v. Davis, 446 U.S. 903 (1980) (Stevens, J., dissenting)."

decision of the Court or for enlargement of the time to petition for rehearing." In granting them relief the Court wrote: "It seems clear to us that we have the power to enlarge the time to petition for rehearing, F.R.A.P. 26(b), 40, and to modify an erroneous decision although the time for rehearing may have expired." See also United States v. Certain Land, 420 F.2d 370, 371 (2d Cir. 1969) (motion to delete costs which had improperly been awarded granted as a petition for rehearing despite the fact that it was filed out of time).

Moreover, the Second Circuit, like every court of appeals that has considered the question,[14] has recognized its power to recall its mandate. See United States v. Dilapi, 651 F.2d 140, 144 (2d Cir. 1981), cert. denied, 455 U.S. 938 (1982); Fine v. Bellefonte Underwriters Ins. Co., 758 F.2d 50, 53 (2d Cir.), cert. denied, 106 S. Ct. 86 (1985) ("A motion to recall or modify the mandate may be made at any time and is referred to the judges who heard the appeal"); Oneida of the Thames Band v. State of New York, supra note 12. While such power is exercised only in exceptional cases, one situation in which it has been recognized to be appropriate is that in which there has been a conflicting decision of this Court. See In re Union Nacional de Trabajadores, 527 F.2d 602 (1st Cir. 1975); United States v. Kismetoglu, 476 F.2d 269 (9th Cir.), cert. dismissed, 410 U.S. 976 (1973);

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14 "Apparently, no court now takes the position that a federal tribunal lacks authority to recall its own mandate." American Iron & Steel Institute v. EPA, 560 F.2d 589, 593 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978). See also Greater Boston Television Corp. v. FCC, 463 F.2d 268 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972); Powers v. Bethlehem Steel Corp., 483 F.2d 963, 964 (1st Cir. 1973); Judkins v. Beech Aircraft Corp., 745 F.2d 1330 (11th Cir. 1984).

and Legate v. Maloney, 348 F.2d 164, 166 (1st Cir. 1965).

Conclusion

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Second Circuit and for remand to that Court should be denied.

September 1987

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APPENDIX: STIPULATION OF PARTIAL SETTLEMENT
IN PHILLIPS V. COUGHLIN, 586 F. SUPP. 1281
(S.D.N.Y. 1984)

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TREVOR LLOYD PHILLIPS, Plaintiff, -against-	:	STIPULATION OF PARTIAL SETTLEMENT
THOMAS A. COUGHLIN III, et al.,	:	81 Civ. 7565 (WCC)

WHEREAS, TREVOR LLOYD PHILLIPS had initiated an action pursuant to 42 U.S.C. §1983 before the United States District Court for the Southern District of New York to redress alleged deprivations of rights under the First and Fourteenth Amendments to the Constitution of the United States of America; and

WHEREAS, the defendants have previously denied allegations of actions resulting in a deprivation of plaintiff's constitutional or statutory rights or entitlements; and

WHEREAS, the parties now desire to enter into a Stipulation for Partial Settlement of Trevor Lloyd Phillips' claims for relief.

IT IS HEREBY STIPULATED AND AGREED by and between the parties, through their representative counsel, and counsel for the New York State Department of Correctional Services ("DOCS") that:

1. Plaintiff filed this action pro se, on December 7, 1981, while incarcerated at the Men's House of Detention on Riker's Island, a correctional facility under the jurisdiction of the Department of Corrections of the City of

New York.

2. By this action plaintiff sought to enjoin the enforcement of DOCS Directive #4914 upon his anticipated transfer to DOCS custody. Plaintiff alleged that the enforcement of that Directive's haircut and shave requirement would violate his religious beliefs as a Rastafarian.

3. Plaintiff was transferred to Ossining Correctional Facility ("Ossining") on March 11, 1982.

4. At the time of his arrival at Ossining, plaintiff had a beard and wore his hair in "dreadlocks".

5. Although plaintiff stated that he objected on religious grounds to the cutting of his hair or beard, and informed corrections officers of the pendency of his lawsuit, his beard was shaved for the purposes of taking an identification photograph pursuant to Directive #4914. At no time did plaintiff consent to the shaving of his beard.

6. Plaintiff does not allege that he was physically abused apart from the involuntary shaving of his beard.

7. Plaintiff's hair was not cut at the time his beard was shaved, and has not been cut to date. Plaintiff was subsequently allowed to regrow his beard.

IT IS FURTHER STIPULATED AND AGREED that neither DOCS nor any of its agents or employees will cut, shave, order the cutting or shaving, or otherwise shorten, remove or comb out plaintiff's hair or beard at any time during his current term of incarceration or any subsequent reincarceration in the event that plaintiff is able to obtain a retrial and is

reconvicted on the same charge. However, other than as stated in the preceding sentence, defendants do not waive the requirements of Directive #4914 that plaintiff's hair and beard be maintained in a clean manner at all times, that plaintiff be required to wear a hair and beard net if he is assigned to work near machinery or food, that plaintiff be required to have his hair tied back in a ponytail with a barrette, rubber band or other fastening device approved by the Superintendent or that plaintiff may be subjected to reasonable hair searches when there is reason to believe that contraband may be discovered by such a search; and

IT IS FURTHER STIPULATED AND AGREED that only remaining issues for litigation are plaintiff's right to and amount of damages, if any, resulting from defendants' involuntary shaving of plaintiff's beard; and

IT IS FURTHER STIPULATED AND AGREED that for the purpose of resolving said issues:

1. Defendants will not contest plaintiff's sincere adherence to his asserted religious beliefs relative to the maintenance of hair and beard as a Rastafarian.

2. Except as to the issue of damages, for the purposes of this action, neither defendants nor plaintiff will present any argument or evidence, either testimonial or documentary, as to the correctional or security justifications underlying the promulgation and enforcement of Directive #4914.

IT IS FURTHER STIPULATED AND AGREED that this Stipulation of Partial Settlement is and shall be limited to this action. Nothing agreed to shall be deemed a waiver by

defendants of their enforcement of DOCS Directive #4914 except as explicitly provided herein. Further, the provisions of this Stipulation shall not operate to prohibit the interposition or introduction by the respective parties to this action of any evidence, argument, or defense waived for the sole purpose of this action in any subsequent or extant litigation relevant to this Directive.

IT FURTHER STIPULATED AND AGREED that irrespective of the decision of the Court as to the remaining issue of damages as described above, the agreements contained in this Stipulation of Partial Settlement and any Order based thereon will remain in force and

(a) will be filed in plaintiff's DOCS Central Office file;

(b) will be filed in plaintiff's Service Unit file;

(c) will be filed in plaintiff's Counsellor's file;

(d) will be filed in plaintiff's institutional file;

(e) will be delivered to the plaintiff, who will be permitted to keep it on his person at all times, including during any transfer between facilities.

IT IS SO STIPULATED.

Dated: New York, New York
September 2, 1983

/s/ Joyce Andren
JOYCE ANDREN
Assistant Attorney General
State of New York
Two World Trade Center
New York, New York 10047
Attorney for Defedants

Dated: New York, New York
September 1, 1983

/s/ [illegible]
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Dated: New York, New York
September 2, 1983

/s/ Janet Neustaetter
JANET NEUSTAETTER
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New York, New York 10005
Attorney for Plaintiff

SO ORDERED:

/s/ William C. Conner
WILLIAM C. CONNER
United States District Judge

Dated: New York, New York
September 6, 1983